

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

75-6033

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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RICHARD LAMBERTSON,

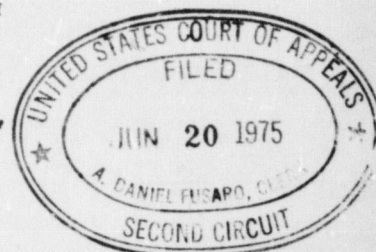
Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA,

Defendant-Appellee.

Fed. #75-6033



P/s

BRIEF ON BEHALF OF PLAINTIFF-APPELLANT

STATEMENT

The plaintiff, Richard Lambertson, appeals from the decision of the Hon. Edmund Port, dismissing the complaint on the 14th day of February, 1975.

The action was brought against the defendant to recover damages for personal injuries by reason of the alleged negligence of the defendant at the Armour and Company Plant, Syracuse, New York. Said action was brought pursuant to the Federal Tort Claims Act.

A motion for summary judgment was made by the defendant and was heard on the 13th day of January, 1975, and on the 10th day of February, 1975. The Court granted the motion for summary judgment and dismissed the summons and complaint herein.

THE FACTS

The plaintiff, while working for Armour and Company, was injured by William Boslet, a meat inspector for the United States Department of Agriculture.

The injury was caused by William Boslet's jumping out and yelling "boo" and then jumping on and riding "piggy-back" the plaintiff, pulling the plaintiff's stocking cap over his eyes, resulting in plaintiff coming in contact with some meat hooks, at the meat packing plant.

As a result of the occurrence aforementioned, which took place on August 30, 1972, the plaintiff commenced an action for the sum of Fourteen Thousand Dollars to recover for personal injuries.

The defendant sought summary judgment pursuant to Rule 12-b of the Federal Rules of Civil Procedure and cited the following grounds upon which this motion was based:

1. Lack of jurisdiction to subject matter; and
 2. The complaint failed to state a claim upon which relief can be granted;
 3. Plaintiff's action arose out of an alleged battery.
- After argument of said motion, the lower court determined that the plaintiff's claim arose out of an assault.

POINT I

THE PLAINTIFF'S STATUS IS SUCH THAT HE MAY RECOVER UNDER THE FEDERAL TORT CLAIMS ACT.

Title 28 of the United States Code, § 1346(b) provides as follows:

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Subject to the provisions of chapter 171 of this title (Sections 2671-2680 of this title) the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under the circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. (my emphasis)

The defendant had contended that the plaintiff falls within a certain category of persons who are precluded from recovery for damages under the Federal Tort Claims Act. In support of this contention, it cited in the lower court *Gardner v. United States*, 446 F. 2d 1195. (C.A. 2d Cir. 1971) and also hornbooks dealing with the definition of battery. The defendant did not discuss assault.

POINT II

THE UNITED STATES IS LIABLE TO THE PLAINTIFF UNDER THE LAW OF NEW YORK.

Negligence in New York is essentially lack of care. Intent is an element where assault is concerned. It is not an action for negligence. *LaPlante v. Johnson* 163, Misc. 961, 1937 aff'd. 225 App. Div. 248 3d Dept. 1938.

POINT III

PLAINTIFF'S ACTION IS NOT BARRED BY SECTION 2680(h).

The Federal Tort Claims Act of 1946 was designed to avoid

injustice to meritorious claims barred before by sovereign immunity and to eliminate the burden of private bills.

United States v. Muniz, 83 S. Ct. 1850, 1853 (1963).

The Federal Tort Claims Act was enacted to promote the interests of justice, but its most important purpose was to dispense with the ancient and archaic idea that the sovereign government could do no wrong, "the old idea on the Continent 'that the King can do no wrong', will be abandoned here in the United States, and the people of the United States will be able to secure justice from their government." 66 Cong. Rec. 2087, Rep. Underhill.

The provisions of this chapter and Section 1346(b) of this title shall not apply to-

- (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

The Legislative intent as to what the government was seeking to exclude; was when some agent of the government gets in a fight with some fellow and "socks" him. *Panella v. United States*, 216 F. 2d. 622, 626, C.A. 2, rev'g. 117 F. Supp. 119 (1954).

It is respectfully submitted that the Congress was seeking to exclude out and out fights such as in *Collins v. United States*, 259, F.Supp. 363, (1966) when an employee of the Post Office "socked" the plaintiff there. The facts in the

instant case are critical. The plaintiff, by having his cap pulled over his eyes was not aware of where he was going or what was happening. At this point, with an employee of the United States Department of Agriculture riding "piggy-back" upon the claimant a "technical" assault may have occurred but it is respectfully submitted there is no intentional wrong.

A legislative history touching §2680(h) suggests the belief that Congress wished to avoid exposure to claims grounded upon the impulsive and "hot-headed" actions of employees. *Lane v. United States*, 225 F. Supp. 850, 851 (1964).

In *Lane v. United States, Supra*, the government was held liable for the acts of its surgeon who, while operating, mistakenly operated on the right knee instead of the injured left knee of a patient. It was held that there was no intentional wrongful act on the part of the operating surgeon in cutting into the wrong knee and the court concluded that § 2680(h) is inapplicable, despite a 'technical' assault occurring.

It is respectfully submitted that there was no intentional wrong on the part of the government's employee and despite the 'technical' assault the intent of Congress in passing this legislation should be considered.

By enactment of the act the public was at long last

given a remedy against the government for its negligent acts. The aged and outmoded idea that "The King can do not wrong" has been overcome to afford the public justice. It is hoped that this right and remedy will not be whittled down by strained traditional interpretation.

CONCLUSION

- (1) The status of the plaintiff is such that he can maintain the action herein.
- (2) The law of New York would permit recovery.
- (3) The instant action is one that is not barred by § 2680(h).

Respectfully submitted,

ANTHONY F. ENDIEVERI,
Attorney for Plaintiff-Appellant.

STATE OF NEW YORK)
COUNTY OF ONONDAGA) SS.:

ANTHONY F. ENDIEVERI, being duly sworn, deposes and says:

1. That on June 12, 1975, I mistakenly mailed ten copies of the appendix in the Lambertson vs. United States Appeal with ten copies of the brief attached thereto, at the main post office at Syracuse, New York, because the form or model of the brief which I was using as a sample was in book form and not a single, separate brief. This book form of the brief had the transcript and the brief itself as one. Therefore, the mistake occurred.

2. That as soon as Elizabeth Wing, Assistant Clerk for the Second Circuit, United States Court of Appeals, telephoned me, I immediately ordered 25 additional copies of my brief and in separate cover mailed them at the United States Post Office on June 17, 1975.

3. On June 18, 1975, Assistant United States Attorney George Lowe was kind enough to stipulate to the late filing and it was approved by him that this filing was made.

/s/ Anthony F. Endieveri
Anthony F. Endieveri

Sworn to before me this
18th day of June, 1975

/s/ Roberta J. Walters
Notary Public

ANTHONY F. ENDIEVERI
ATTORNEY AT LAW
CAMILLUS, NEW YORK 13031

ROBERTA J. WALTERS
Notary Public in the State of New York
Qualified in Onondaga Co. No. 4528234
Commission Expires March 30, 19__